connection with the production of gross income of the taxpayer. The fact that the expense is contractual is irrelevant for tax purposes. Being private and vacational the expense clearly cannot be both wholly and exclusively incurred in connection with the production of gross income of the appellant. The expense therefore is caught by s. 33 read with s. 39(1)(b) of the Act.

For the reasons stated, this appeal is dismissed with costs. The Deciding Order of the Special Commissioners dated 24 March 1983 is hereby confirmed.

SEMANTAN ESTATE (1952) SDN. BHD.

v.

THE GOVERNMENT OF MALAYSIA

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN
MOHD YATIM J.
[CODE NO. D4-21-4-89]
14 JUNE 1994

PRACTICE & PROCEDURE: Striking out writ of summons - Meaning of suit - Limitation - Whether there was continuing trespass - Res judicata - Whether there were special circumstances.

The plantiff was the registered owner and in possession of 700 acress of land (said land). The defendant is alleged to have taken possession of 250 acres of the said land wrongfully and/or without any legal right to do so sometime in December 1956. The plaintiff contended that the defendant and/or its agents had not conducted an enquiry or paid any award for land acquired. Prior to the present proceedings, the dispute over the acquisition of the said land had been brought to the Court for adjudication on two occasions.

Held:

[1] In the present suit the plaintiff is claiming a declaration and damages. The present suit is covered by s. 2(a) of the Public Authorities Protection Act. The word suit in the section not be given a restrictive meaning.

[2] The Collector in making the award was exercising a quasi - judicial function. Once the award was made he was *functus officio.* He cannot set aside his own award. The power of setting aside the award is vested in the High Court. Since the award has not been set aside, the defendant is still in lawful possession of the land. Therefore, the question of trespass or continuting trespass does not arise in this case.

[3] Since the same matter has been litigated earlier in the second *Semantan* case, the principle of *res judicata* applies to the present case. There are no special circumstances in the present case. The appellant had a remedy but had never availed himself of it. In the present case there has been actual decision by the High Court and the Supreme Court in the second *Semantan* case. The parties are the same and the basic issue raised before the Supreme Court and in

the present case is the issue pertaining to the acquisition of the said land.

[Defendants application to strike out writ of summons allowed].

Cases referred to:
Semantan Estate (1952) Sdn. Bhd. v. Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346 ***(foll)***
Wee Bing Po v. Dayang Anak Ngipa [1974] 2 MLJ 56 ***(refd)***
Brunsden v. Humphrey [1884] 14 QBD 114 ***(refd)***
Arnold & Ors. v. National Westminster bank PLC [1991]2 MLJ 1177 ***(dist)***
Semantan Estate (1952) Ltd v. Collector of Land Revenue [1960] 26 MLJ 300 ***(refd)***
Tio Chee Hing & Ors. v. Government of Sabah [1981] 1 MLJ 207 ***(foll)***
Brisbane City Counsel v. Attorney-General from Queensland [1979] AC 411 ***(dist)***
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd & Anor. [1975] AC 581 ***(foll)***
Re Singapore Souvenir Industry (Pte) Ltd [1986] 1 MLJ 14 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 9(1)
Land Acquisition Enactment (Cap 40) ss. 8, 11, 22, 49
Public Authorities Protection Act 1948, ss. 2, 6, 9
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Ira Biswas; M/s. Chooi & Company
For the defendent - Susila S. Param, SFC

JUDGMENT

Dr. Zakaria Bin Mohd Yatim H:
This is an application by the defendant for an order that the writ of summons be struck out under O. 18 r. 19 of the Rules of the High Court and/or under the inherent jusdiction of the Court on the grounds that:

(1) the suit discloses no reasonable cause of action;
(2) it is scandalous, frivolous, vexatious and/or otherwise an abuse of the process of the Court in that:
    (a) the institution thereof is barred by the provisions of s. 2(a) of the Public Authorities Protection Act, 1948 (Act 198) and/or s. 9(1) of the Limitation Act 1953 (Act 254);
    (b) there has been inordinate delay;
    (c) the facts and matters raised and relied on in the suit are substantially the same as those raised and relied on in originating motion No. A49 of 1983 in the High Court of Malaya at Kuala Lumpur between the plantiff herein as the applicant and the Collector of Land Revenue Wilayah Persekutuan;

The defendant also asks that all further proceedings in this suit be stayed pending the disposal of this application and that the costs of this suit and application be paid by the plaintiff to the defendant.

The application was heard in chambers. After hearing the arguments of Miss Susila Param, Senior Federal Counsel for the Government of Malaysia and Miss Ira Biswass, Counsel for the plaintiff, I allowed the application with costs. On the application of Miss Biswas, I adjourned the matter into open Court for further argument. After hearing further argument in open Court, I confirmed the decision I made in chambers with costs to the defendant.

In the statement of claim the plaintiff averred that it was the registered owner and in possession of 700 acres of land held under Lot 4898 comprised in C.T. 17038 Mukim of Batu (formerly part of the land known as Lot No.4647 comprised in C.T. 12530). The plaintiff alleged that on or about 3 December 1956 the defendant took possession of 250 acres of the said land wrongfully and/or without any legal right to do so. The particulars of the alleged wrongful possession are as follows:

(a) The award made by the Collector of Land Revenue Wilayah Persekutuan (hereinafter called "the collector"), a servant and/or agent of the defendant on 27 November 1956 was invalid and *ultra vires* as it was based on a revised area of 250 acres and not on the area of 225 acres gazetted under government gazette of 25 October 1956 appearing in Notice No.577.
(b) The enquiry held on 20 November 1956 and adjourned to 27 November 1956 at which the award stated in paragraph 3(a) above was made was irregular and null and void for failure by the Collector to comply with the following sections of the Land Acquisition Enactment (Cap. 40):
    (i) Section 8, in that the collector failed to cause the land subject to the acquisition to be marked out, measured and a plan made thereof;
    (ii) Section 9(ii); in that the notice dated 31 October 1956 and served on 5

November 1956 was that served for an enquiry to be held on 20 November 1956.

(iii) Section 11(i); in that the collector failed to consider objections of interested parties to the measurements made under s. 8 and that the collector failed to apportion the compensation among all the persons known or believed to be interested in the land.

(c) The collector took possession of the 250 acres of the said land on the 3 December 1956 wrongfully and/or without any legal right to do so.

On or about 22 January 1958 the State Secretary of Selangor gave a notice of withdrawal from acquisition over an area of land of 22 acres 1 rood 24 poles of the said land. By a notification No.117 published in the Gazette on 6 March 1958 the defendant proposed to acquire a further 60 acres 2 roods 27.5 poles of the said land. The plaintiff alleged that the defendant had not conducted an enquiry or paid any award in respect of the 60 acres plus and took possession of the land wrongfully and/or without any legal right to do so and had thereafter wrongfully remained in possession of the land.

At the commencement of the hearing, Miss Susila Param said that she was abandoning ground one of her application, that is, that the suit discloses no reasonable cause of action. In her submission she said that the plaintiff's allegation was that the collector had adopted a wrong procedure and therefore the defendant was in wrongful possession of the land.

Her main contention, however, was that the plaintiff was time barred under s. 2A of the Public Authorities Protection Act 1948. She said that this matter had already been decided by the Supreme Court in *Semantan Estate (1952) Sdn. Bhd. v. Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346. In that case the application was for *mandamus*. In the present case the application was for a declaration. Her next contention was that the doctrine of *res judicata* applied to the present case because the issues had already been litigated in the earlier case.

Miss Biswas argued that the plaintiff was not time barred in the present proceedings. She said that the cause of action was trespass and it was a continuing trespass. She argued that the same facts could give arise to different causes of action. There could be two causes of action arising from the same facts. She cited *Wee Bing Po v. Dayang Anak Ngipa* [1974] 2 MLJ 56 where the Court decided that there were two causes of action which were distinct and not the same and the evidence in support of the other cause of action was different from that raised in respect of the earlier cause of action. She also cited *Brunsden v. Humphrey* [1884] 14 QBD 114. In that case the English Court of Appeal held that damages to goods and injury to the person, although they had been occassioned by one and the same wrongful act, were infringment of different rights and gave rise to different causes of action and therefore the recovery in an action of compensation for the damage to the goods was no bar to an action subsequently commenced for the injury of the person.

Miss Biswas also argued that *res judicata* did not apply to the present case because in the earlier case the application was for *mandamus* "to enforce the collector to complete the acquisition ..." she said that in the present case the plaintiff's action was on tort for trespass. She relied on *Arnold and Ors. v. National Westminster Bank PLC* [1991] 2 WLR 1177 in support of her argument.

It is relevant to note here that prior to the present proceeding, the dispute over the acquisition of the said land had been brought to the Court for adjudiction on two occasions. The first case, *Semantan Estate (1952) Ltd. v. Collector of Land Revenue* [1960] 26 MLJ 300 (first *Semantan* case) was a land reference case. Ong J, as he then was, held that he had no jurisdiction to entertain the reference. There was no appeal against the decision of the learned Judge. The second case, *Semantan Estate (1952) Sdn. Bhd. v. Collector of Land Revenue Wilayah Perseketuan* [1987] 2 MLJ 346 (second *Semantan* case) was decided by the Supreme Court. In that case the appellant applied for leave to apply for an order of *mandamus* directed at the respondent to complete the requisition procedure. Leave was granted and the appellant applied by notice of originating motion for an order of *mandamus*. The respondent thereupon applied for the originating motion to be struck out. Harun J. as he then was, gave judgment in favour of the respondent on the ground that the institution of the suit was barred by virtue of s. 2(a) of the Public Authorities Act 1948 and there was undue delay. The Supreme Court held that the

appellant had a right of appeal against the decision of Ong J. in refusing to hear the reference and therefore had failed to avail itself of the alternative remedy. The appellant had no specific legal right to apply for *mandamus*. The Supreme Court also held that there was undue delay in that case and such delay would disentitle the appellant to the remedy. The Supreme Court further held that there was no good reason in giving the word "suit" in the Act a restricted meaning so as to make the limitation prescribed by it not applicable to the prerogative writ of *mandamus*.

In delivering the judgment of the Supreme Court, Lee Hun Ho CJ (Borneo)said at page 349:

> The conduct of the appellant must be taken into consideration. The matter happened so long ago and also the fact that the appellant had agreed to waive certain irregularities no doubt to facilitate the making of a decision. The respondent had made an award which was much lower than what the appellant asked for. The High Court had declined jurisdiction as the reference was not expressly made within the provision of s. 22 of the Enactment. The appellant had a right of appeal against that decision but had apparently been advised not to appeal. In effect the appellant had a remedy but had never availed himself of it. Instead, he applied for an order of mandamus long after his right to the remedy lapsed. There must be an end to litigation and the process of the Court should not be allowed to be abused.

The learned Chief Justice went on to state that "delay in this case is so clear that it would disentitle the appellant to the remedy..."

I respectfully adopt the above reasoning of the learned Chief Justice for the purpose of the present case.

Section 2(a) of the Public Authorities Act provides:

> (a) the suit, action, prosecution or proceeding shall not lie unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage within thirty-six months next after the ceasing thereof;

In my opinion the plaintiff is time barred from instituting the present proceeding under s. 2(a) of the Public Authorities Protection Act. See *Tio Chee Hing & Ors. v. Government of Sabah* [1981] 1 MLJ 207. In the present suit the plaintiff is claiming a declaration and damages. In my view, the present action is covered by s. 2(a) of the said Act. The word "suit" in the section should not be given a restrictive meaning. See the second *Semantan* case.

Miss Biswas submitted that there was a continuing lack of lawful authority to stay on the land and the defendant continued to trespass on the land. She said that by the collector's admission, the enquiry on 27 November 1956 as a whole was a nullity.

On 27 November 1956 the award was made for 250 acres and possession was taken by the Government on 3 December 1956. Subsequently the Selangor Government gave notice of withdrawal under s. 49 of the Land Acquisition Enactment of an area of 22 acres 1 rood and 24 poles. On 3 May 1958 the collector wrote to the solicitors for the plaintiff stating that the award of the collector on 27 November 1956 was invalid and the enquiry as a whole was a nullity. In the first *Semantan* case Ong J did not set aside the award of the collector dated 27 November 1956. In my view, the collector, in making the award was exercising a quasi-judicial function. Once the award was made he was *functus officio*. He cannot set aside his own award. The power of setting aside the award is vested in the High Court. Since the award had not been set aside, the defendant is still in lawful prossession of the land. Therefore, the question of trespass or continuing trespass does not arise in this case.

Since the same matter has been litigated earlier in the second *Semantan* case, the principle of *res judicata* applies to the present case.

Miss Biswas cited *Arnold & Ors. v. National Westminster Bank, supra*. In that case the House of Lords held:

> that although issue estoppel constituted a complete bar to relitigation between the same parties of a decided point, its operation could be prevented in special circumstances; that where further material relevant to the correct determination of a point involved in earlier proceedings which could not, by reasonable diligence, be brought forward in those proceedings became available, it gave rise to an exception to issue estoppel, whether or not that point had been specifically raised and decided; that such further material was not confined to matters of fact; but that where a judge made a mistake and a higher Court overruled him in a subsequent case, justice required that the party who suffered from the mistake should not be prevented from

reopening that issue when it arose in later proceedings; and that, accordingly, the plaintiffs ought to be permitted to reopen the question of construction decided against them by Walton J.

In that case the House of Lords noted (at page 1185) that the operation of estoppel could be prevented because there were special circumstances in that case. The House of Lords said (at page 1182) that Walton J wrongly construed the rent review clause, and his approach to the question of construction was wholly incorrect in law. When the second rent review date accrued in 1988 the plaintiffs sought to reopen the question of construction. They brought the action by writ claiming rectification of the lease and also for determination as to the true construction of the clause. The defendants applied to strike out the claim on the ground that the plaintiffs were barred by issue estoppel from litigating the very point decided by Walton J.

In my opinion there are no special circumstances in the present case. The Supreme Court said in the second *Semantan* case, that Ong J. "had declined jurisdiction as the reference was not expressly made within the provision of s. 22 of the Enactment." The Supreme Court further said that the appellant had a right of appeal against the decision of Ong J. The appellant had a remedy but had never availed himself of it.

Miss Biswas also cited *Brisbane City Counsel v. Attorney-General from Queensland* [1979] AC 411. In that case the Privy Council said, at page 425, "There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case..."

In the present case there has been actual decision by the High Court and the Supreme Court in the second *Semantan* case. The parties are the same and the basic issue raised before the Supreme Court and in the present case is the issue pertaining to the acquisition of the said land.

In the *Brisbane* case, the Privy Council, citing *inter alia* its earlier decision in *Yat Tung Investment Co. Ltd v. Dao Heng Bank Ltd and Anor.* [1975] AC 581 said, at page 425, that the doctrine of *res judicata* "ought only to be applied when the facts are such as to amount to an abuse ..." In the second *Semantan* case, the Supreme Court has already said, "There must be an end to litigation and the process of the Court should not be allowed to be abused."

After considering all the circumstances in the present case, I find the present action filed by the plaintiff is an abuse of the process of the Court.

In my opinion this is a proper case for striking out the writ and statement of claim under O. 18 r. 19. In *Tio Chee Hing & Ors. v. Government of Sabah (supra)*, the plaintiff filed a claim for damages against the Government of Sabah alleging breach of agreement by the Government of the Colony of North Borneo to lease a further 2430 acres to the plaintiff. The Government of Sabah did not enter appearance or file a defence but applied to strike out the statement of claim on the ground *inter alia* that the claim was statute barred. The Federal Court held that the claim was cleary statute barred and not maintainable against a defence that relied on limitation. The claim in the present case should also be struck out on the ground that it is an abuse of the process of the Court and the matter is *res judicata*. See *Re Singapore Souvenir Industry (Pte) Ltd* [1986] 1 MLJ 14.

For the reasons stated above I confirmed the decision I made in chambers.